LIBRARY
SUPREME COURT, U. S.

FILED
AUG 29 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 307

ROY GERBER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, deceased,

Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENT IN OPPOSITION.

MORTON R. GALANE,
1100 First National Bank Bldg.,
Las Vegas, Nevada 89101,
(702) 382-3290,
Counsel for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

SUBJECT INDEX

Page

Statement 1

Argument 6

Answer to Question No. 1.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of Denial of Due Process of Law 6

Answer to Question No. 2.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of Denial of the Right of Jury Trial 11

Answer to Question No. 3.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of the Preemptive Effect of the Sears and Compco Decisions of the United States Supreme Court 11

Conclusion 15

TABLE OF AUTHORITIES CITED

Cases — Page

Albright v. McTighe, 49 Fed. 817 7

Bank of America National Trust & Sav. Ass'n v. Hayden, 231 F. 2d 595 13

Cable Vision, Inc. v. KUTV, Inc., 335 F. 2d 348, cert. den., 379 U.S. 989 13

Camp v. Gress, 250 U.S. 308, 39 S. Ct. 478, 63 L. Ed. 997 10

Casino Productions v. Vitaphone Corporation, 163 Misc. 403, 295 N.Y.S. 501 13

Columbia Broadcasting System, Inc. v. De Costa, 377 F. 2d 315, cert. den., 389 U.S. 1007 13

Compco Corp. v. Dry-Brite Lighting, Inc., 376 U.S. 334, 84 S. Ct. 779, 11 L. Ed. 2d 669, reh. den., 377 U.S. 913, 84 S. Ct. 1162, 12 L. Ed. 2d 183 ..... 11, 12, 13, 15

Constitution Pub. Co. v. Dale, 164 F. 2d 210 8

Crockett Engineering Co. v. Ehret Magnesia Mfg. Co., 156 F. 2d 817 9

Deering, Milliken & Co. v. Gilbert, 269 F. 2d 191 13

Dollar S.S. Lines v. Merz, 78 F. 2d 594 10

Edquest v. Tripp & Dragstedt Co., 93 Mont. 446, 19 P. 2d 637 7

Gilbert v. State of California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 6

Gordon v. Warner Bros. Pictures, Inc., 74 Cal. Rptr. 499 15

Harms, Inc. v. Tops Music Enterprises, Inc., of Cal., 160 F. Supp. 77 14

Hotel Riviera, Inc. v. Short, 80 Nev. 505, 396 P. 2d 855 7

Page

Howard v. United States, 241 F. 2d 759 9

Husky Refining Co. v. Barnes, 119 F. 2d 715 9

James-Dickinson Co. v. Harry, 273 U.S. 119, 47 S. Ct. 308, 71 L. Ed. 569 10

Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S. Ct. 1072, 18 L. Ed. 2d 75 6

Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661, reh. den., 376 U.S. 973, 83 S. Ct. 1131, 12 L. Ed. 2d 87 ..11, 13, 15

Siebrand v. Gossnell, 234 F. 2d 81 13

State v. Cook, 400 S.W. 2d 39 6

State of California v. Taylor, 353 U.S. 553, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 6

Strand v. Griffith, 109 Fed. 597 7

Washington Gas Light Co. v. Lansden, 172 U.S. 534, 19 S. Ct. 296, 43 L. Ed. 543 7

Webster v. Motor Car Co., 135 F. Supp. 4, 243 F. 2d 418, cert. denied, 355 U.S. 822 8

Rules

Federal Rules of Civil Procedure, Rule 51 4

Statutes

United States Code, Title 15, Sec. 1127 15

United States Code, Title 28, Sec. 2106 10

United States Code Annotated, Title 28, Sec. 2111 10

Textbooks

9 American Law Reports, 3d, pp. 692, 701, Sec. 4 .. 7

20 American Law Reports, 3d (1967), pp. 648, 666 .. 7

IN THE

Supreme Court of the United States

October Term, 1969
No. 307

ROY GERBER,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of Rene Bardy, deceased,

Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENT IN OPPOSITION.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Statement.

The record before the United States Supreme Court reveals that the following pertinent facts have been omitted from the petition for certiorari:

1. The Respondent did not attempt to present any evidence as to the corporate pecuniary condition of MCA Artists, Ltd. and no evidence of that character was received at the trial.

2. The Petitioner did not attempt to present any evidence as to his individual pecuniary condition and no evidence of that character was received at the trial.

3. The Petitioner did not request any jury instructions in support of a form of verdict which would have enabled the jury to assess punitive damages against the several defendants in different amounts, each according to his means.

4. The Petitioner did not take formal exception to the jury instructions given in support of a form of verdict, pursuant to which the jury returned a common verdict of punitive damages against such of the defendants as were found by the jury to have deserved such an award [R. T. 2785-2788, 2796-2797, 2800, 2802-2805].

5. The jury instructions, to which no exception was taken, support an interpretation of the jury's verdict in such a manner that the degree of culpability may be attributable solely to the conspiracy of Beldon Katleman, Roy Gerber and Matt Gregory and remained the same whether or not the evidence supported a finding that MCA Artists, Ltd. ratified the membership of Roy Gerber in the aforesaid conspiracy.

6. All parties agreed that Nevada did not have a contribution statute [R. T. 2797] and a stipulation was entered into that, if there is a sum of money awarded as exemplary damages as against one or more defendants, the satisfaction of that sum by one will constitute satisfaction by all or *pro tanto* satisfaction by one will constitute *pro tanto* satisfaction by all [R. T. 2801-2802].

7. The Petitioner did not move to strike, move for a corrective instruction or move for a mistrial by reason of a reference in the summation of Respondent to the assessment of punitive damages against MCA Artists, Ltd.; and an interval of twenty-four hours, including an intervening night, before rendition of the verdict, afforded an adequate opportunity for Petitioner to decide whether anything prejudicial was said during the summation [R. T. 3061-3063, 3228].

8. The trial court, both during the course of the trial and in the charge, cautioned the jury that the statements and arguments of counsel were not evidence in the case [R. T. 1949-1950, 3069].

9. The trial court cautioned the jury that, upon the conspiracy claim, each defendant was entitled to a fair consideration of his own defense and was not to be prejudiced by a finding against the others [R. T. 3208].

10. There is no showing that prior to the selection and swearing of the jury any juror was questioned as to his knowledge of the size or financial strength of MCA Artists, Ltd. and there is no support in the record for the contention that MCA Artists, Ltd. was well-known to members of the jury as a corporate giant or as a financially strong defendant.

1. The jury was not compelled to award punitive damages against all the defendants found to have been members of the conspiracy charged, because the jury was instructed that it could strike out any names from the punitive damage verdict and, indeed, did strike the

names of two defendants [R. T. 2804, 3105-3108; C. T. 1875-1876].

Viewed against the state of the record as to proceedings before the trial court, the Petitioner had waived the contention before the Court of Appeals that the retention of MCA Artists, Ltd. as a party defendant had impeded, hampered or prejudiced him in the defense of his case on the issue of punitive damages. Indeed, the Petitioner did not contend before the Court of Appeals that the presence of MCA Artists, Ltd. influenced the admission or rejection of any evidence or that the trial did not go on much the same as if MCA Artists, Ltd. had not been a party thereto. Nevertheless, the Petitioner knew that MCA Artists, Ltd. had challenged the sufficiency of evidence to support a finding of liability against MCA Artists, Ltd.

After the Court of Appeals decided not to reverse the judgment in its entirety, although it reversed the judgment as to MCA Artists, Ltd., the Petitioner for the first time in a petition for rehearing advanced the contention that the award of punitive damages should be reversed in its entirety. The original appeal failed to present the question whether a special reason existed to justify a result other than reversal as to MCA Artists, Ltd. and affirmance as to the other defendants.

Prior to the charge the trial court quoted FRCP Rule 51 verbatim and advised counsel of the necessity for compliance therewith [R. T. 3052-3054]. An opportunity was given for objections to the initial charge [R.

T. 3137-3185]. After the supplemental charge, an opportunity was again given for objections [R. T. 3213]. Thereafter, trial counsel expressed their waiver of objections [R. T. 3222, 3225,3226]. An extended discussion was held on the subject of the form of the verdict in regard to punitive damages under the conspiracy claim [R. T. 2785-2788, 2796-2805].

The statement in the petition for certiorari inaccurately leaves the impression that the Court of Appeals shifted the burden of punitive damages, that the trial court precluded any division of damages among the defendants and that the jury was forced to consider all defendants in determining appropriate punitive damages. To the contrary, the Petitioner acquiesced in the formulation of the law of the case applicable to the punitive damage award.

Because the statement in the petition for certiorari does not discuss the record insofar as it pertains the federal preemption question, the Respondent has deferred its discussion of the record until the argument on that issue hereinbelow.

ARGUMENT.

It is the normal policy of the United States Supreme Court not to consider issues which have been waived before the Court of Appeals. *State of California v. Taylor*, 353 U.S. 553, 556-557, n. 2, 77 S. Ct. 1037, 1039-1040, 1 L. Ed. 2d 1034 (1957); see *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 330, 87 S. Ct. 1072, 1081, 18 L. Ed. 2d 75 (1967).

Certiorari should not be granted unless the record reveals facts with sufficient clarity to enable the Court to decide the question presented. *Gilbert v. State of California*, 388 U.S. 263, 269, 87 S. Ct. 1951, 1954, 18 L. Ed. 2d 1178 (1967).

ANSWER TO QUESTION NO. 1.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of Denial of Due Process of Law.

The Petitioner had an adequate opportunity to invoke whatever procedural means were necessary to assume a posture independent of MCA Artists, Ltd. in regard to the assessment of punitive damages under the conspiracy claim.

The Petitioner could have attempted to prove his individual pecuniary condition and accompany it with a request for a jury instruction in support of a form of verdict which would have enabled the jury, in fixing the amount of punitive damages, to consider such pecuniary condition in a separate assessment of punitive damages limited in amount to his own means. *State v. Cook*, Mo., 1966, 400 S.W. 2d 39, 41-42. The Petitioner was given the opportunity at the trial to request a form of verdict which allowed the jury to impose different

amounts of punishment [R. T. 2802-2805]. The Petitioner acquiesced in a jury instruction in support of a form of verdict which allowed only a lump sum award of punitive damages, reserving to the jury the power to strike out the name of that defendant against whom the jury did not choose to award punitive damages [R. T. 2800, 2804, 3105-3108]. The Petitioner waived the right to request separate awards of punitive damages, viewed against proof of an individual defendant's ability to pay in order to reduce the punishment. See Anno., 9 A.L.R. 3d 692, 701, § 4; *Edquest v. Tripp & Dragstedt Co.,* 93 Mont. 446, 19 P. 2d 637, 640-649 (1933). Nevada allows separate awards in regard to punitive damages. *Hotel Riviera, Inc. v. Short,* 80 Nev. 505, 396 P. 2d 855, 20 A.L.R. 3d 648 (1967); see Anno., 20 A.L.R. 3d 666.

No evidence was received as to the wealth or the ability to respond in damages of MCA Artists, Ltd. Therefore, the Court of Appeals could not conclude from the record that the amount of punitive damages had been enlarged because of such evidence; *Washington Gas Light Co. v. Lansden,* 172 U.S. 534, 556, 19 S. Ct. 296, 304, 43 L. Ed. 543 (1899), *Albright v. McTighe,* 49 Fed. 817, 823-824 (C.C., W.D. Tenn. 1892) and *Strand v. Griffith,* 109 Fed. 597, 600 (C.D.D. Minn. 1901) are distinguishable.

The instructions to the jury to which no exception was taken, support an interpretation of the verdict that the degree of culpability may be attributable solely to the conspiracy by Beldon Katleman, Roy Gerber and Matt Gregory and remained the same whether or not the evidence supported a finding that MCA Artists, Ltd. ratified the membership of Roy Gerber in the

aforesaid conspiracy. The award of punitive damages, therefore, would have been justified had MCA Artists, Ltd. not been a defendant. Under these circumstances, it has been held that the Court of Appeals may best serve the ends of justice by not reversing the award in its entirety, although it reverses the joint and several judgment only as to a single defendant. *Constitution Pub. Co. v. Dale,* 164 F. 2d 210, 213-214 (5th Cir. 1947).

The summation by Respondent requested the jury to award punitive damages against all defendants found to have been members of the conspiracy [R. T. 2948-2949]. The reference to the assessment of punitive damages against MCA Artists, Ltd. at a particular point in the summation does not stress the financial strength of MCA Artists, Ltd. It is apparent that the reference to MCA Artists, Ltd. was not deemed sufficiently prejudicial to justify Petitioner to move to strike, to move for corrective instruction or to move for a mistrial. After the summation twenty-four (24) hours, including an intervening night, elapsed before rendition of the verdict; Petitioner had a full opportunity to decide whether anything prejudicial was said during the summation [R.T. 3061-3063, 3088]. Nothing was brought to the attention of the trial court. Under these circumstances, it appears to be an afterthought now to assert that the wealth of MCA Artists, Ltd. was stressed. *Webster v. Motor Car Co.,* D.C. D.C., 135 F. Supp. 4, 12, reversed on other grounds, D.C. Cir., 243 F. 2d 418, cert. denied, 355 U.S. 822.

During the course of the trial and in the charge the trial court cautioned the jury that the statements and arguments of counsel are not evidence in the case

[R. T. 1949-1950, 3069]. Careful instructions were given on the proper measure of punitive damages [R. T. 3102-3105, 3203-3208]. It is to be assumed in the absence of a showing to the contrary that the jury followed the court's instructions. *Husky Refining Co. v. Barnes*, 119 F. 2d 715, 717 (9th Cir. 1941); *Crockett Engineering Co. v. Ehret Magnesia Mfg. Co.*, 156 F. 2d 817, 820 (D.C. Cir. 1946).

A joint tort-feasor who is himself guilty of the tort cannot compel contribution of the punitive damages, and therefore is not harmed by the setting aside of the verdict against MCA Artists, Ltd. in this regard. Indeed, this inability to compel contribution under Nevada law led to a stipulation that, if there is a sum of money awarded as exemplary damages as against one or more defendants, the satisfaction of that sum by one will constitute satisfaction by all or *pro tanto* satisfaction by one will constitute *pro tanto* satisfaction by all [R. T. 2801-2802].

There is absolutely no showing that the retention of MCA Artists, Ltd. as a party defendant impeded, hampered or prejudiced the other defendants in the defense of their case. Petitioner does not show anything to refute that the same evidence would have been introduced that was introduced or that the trial went on much the same as if MCA Artists, Ltd. had not been a party thereto. Under these circumstances, the judgment should not be reversed in its entirety. *Howard v. United States*, 241 F. 2d 759, 761 (10th Cir. 1954).

It has long since been settled law in the federal courts, in tort actions brought against several jointly

instead of against each separately, that the verdict may be set aside against some and affirmed as against others. *Camp v. Gress*, 250 U.S. 308, 317, 39 S. Ct. 478, 482, 63 L. Ed. 997 (1919); *James-Dickinson Co. v. Harry*, 273 U.S. 119, 122, 47 S. Ct. 308, 310, 71 L. Ed. 569 (1927); *Dollar S.S. Lines v. Merz*, 78 F. 2d 594, 595 (9th Cir. 1934).

Title 28, United States Code, Section 2106 states:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The duty is especially enjoined of giving judgment in appellate proceedings "without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C.A. § 2111. These acts of Congress provide the source of authority for the Court of Appeals to reverse against one defendant without reversing the judgment against the others. *Camp v. Gress, supra*, 250 U.S. at 318.

There is no clear basis for presenting the question directed to the alleged denial of due process of law. Indeed, it is arguable that the trial record was insufficient for the Court of Appeals to apply the standard whether "substantial injustice" to the Petitioner might result from reversal of the judgment as to MCA Artists, Ltd. alone. Assuming *arguendo* that the Court of Appeals did apply the standad in favor of affirming the

judgment as to the Petitioner, it is clear that viewed against the record, there was no abuse of discretion.

In conclusion, the United States Supreme Court does not have before it a record which warrants an examination of the effect of the due process clause on the judgment of the Court of Appeals in this case, wherein there was reversal as to MCA Artists, Ltd. and affirmance as to Petitioner.

ANSWER TO QUESTION NO. 2.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of Denial of the Right of Jury Trial.

For the same reasons heretofore advanced in Answer to Question No. 1, *supra*, the United States Supreme Court does not have before it a record which warrants an examination of the effect of the guaranty of the right to jury trial on the judgment of the Court of Appeals in this case, wherein there was reversal as to MCA Artists, Ltd. and affirmance as to Petitioner.

ANSWER TO QUESTION NO. 3.

The Record Does Not Warrant a Decision as to the Question Presented in Terms of the Preemptive Effect of the Sears and Compco Decisions of the United States Supreme Court.

The record fails to reveal a basis for determining the federal preemptive effect on the instant proceeding of *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964), rehearing denied, 376 U.S. 973, 83 S. Ct. 1131, 12 L. Ed. 2d 87 (1964), and *Compco Corp. v. Dry-Brite Lighting, Inc.*, 376 U.S. 334, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964),

rehearing denied, 377 U.S. 913, 84 S. Ct. 1162, 12 L. Ed. 2d 183 (1964).

The jury instructions, which were not excepted to, were appropriate to a conspiracy whose object was allegedly to harm Bardy in his contract-property rights incident to La Nouvelle Eve.

The jury was instructed to determine whether one or more of our acts of damage were committed pursuant to and in furtherance of the conspiracy as charged, said damage issues being: (1) use of plaintiff's property by El Rancho Vegas Hotel between April 8, 1959, and June 2, 1959, under the title "La Nouvelle Eve"; (2) causation of confusion as to the source of production by El Rancho Vegas Hotel presenting a show between July 29, 1959, and October 21, 1959, under the title "La Nue Eve"; (3) causation of injury to the value of the trade name "La Nouvelle Eve" by El Rancho Vegas Hotel presenting a show of a different class of production between July 29, 1959, and October 21, 1959, under the title "La Neu Eve"; (4) deprivation of the services of plaintiff's performers in a show at plaintiff's night club in Paris, France, by continuing their employment at El Rancho Vegas Hotel in the show presented between July 29, 1959, and October 21, 1959, under the title "La Neu Eve" [R. T. 3089-3092].

Where interrogatories have not been requested for submission with a general verdict and a special verdict has not been requested and possible combinations of permissible findings exist, the verdict is construed as reponsive to any and all issues in the case, including the alternative theories of damages, and support of the

judgment is sought upon any ground disclosed in the record. *Bank of America National Trust & Sav. Ass'n v. Hayden,* 231 F. 2d 595, 602 (9th Cir. 1956); *Siebrand v. Gossnell,* 234 F. 2d 81, 88-89 (9th Cir. 1956).

As to the first damage issue, the evidence showed that the costumes, performers, production numbers and names "La Nouvelle Eve" were used by El Rancho Vegas Hotel between April 8, 1959, and June 2, 1959, without the consent of or compensation to Bardy. The jury verdict may be construed as basing the award under the first damage issue, assuming *arguendo* that the jury did so base its award, on recovery for the use of an inseparable combination. *Deering, Milliken & Co. v. Gilbert,* 269 F. 2d 191, 194, n. 3 (2nd Cir. 1959). There can be no federal preemptive effect on the law of protection of costumes and performers' employment relations. Production numbers in a night club revue have been recognized as protectible by common-law copyright. *Casino Productions v. Vitaphone Corporation,* 163 Misc. 403, 295 N.Y.S. 501, 505. Common-law copyright has been held to survive the *Sears* and *Compco* decisions of the United States Supreme Court. *Cable Vision, Inc. v. KUTV, Inc.,* 335 F. 2d 348, 351 (9th Cir. 1964), cert. denied, 379 U.S. 989. No conflict of principles ariss out of *Columbia Broadcasting System, Inc. v. De Costa,* 377 F. 2d 315 (1st Cir. 1967), cert. denied, 389 U.S. 1007, which held that characters are not entitled to copyright protection under either state or federal law and that, if any protectible right existed, it was waived when the protectible feature was printed on cards that were published and were not copyrighted. Therefore, under the first damage issue, there would have been a piracy of the whole show and

the name could not be disassociated from it. *Harms, Inc. v. Tops Music Enterprises, Inc., of Cal.,* 160 F. Supp. 77, 81 (S.D. Cal.). A verdict under the first damage issue does not present the question whether the name *per se,* disassociated from the show, was given common-law protection; and so preemptive effect cannot arise as an issue.

As to the second and third damage issues, the jury was instructed without objection by the Petitioner to determine from the evidence whether many people of the place associated the title "La Nouvelle Eve" with a show in fact produced by the plaintiff and whether the probable consequences of the use of the name or title complained of in all reasonable probability would be to confuse or deceive the public as to the source of the producer of the show [R. T. 3093-3094]. The jury was instructed to determine whether the name or title was adopted for the purpose of taking advantage of the good will, if any, which surrounded the name or title, La Nouvelle Eve, in the entertainment world or among the show-going public [R. T. 3094]. No request was made for any jury instructions further refining the definition of "secondary meaning." The record contains no evidence that any "La Nouvelle Eve" show other than that produced by Bardy could have been associated in the public's mind with the name. Therefore, a jury verdict in favor of Bardy on the second and third damage issues may reasonably be construed as implicitly finding that the title has been so exclusively identified with Bardy's show as to indicate his show, and his alone, and that the title was used with the intent to deceive the public into believing that the "La Nue Eve" show at El Rancho Vegas Hotel was based upon

or connected with Bardy's show. A verdict based on such findings remains unaffected by the federal preemption doctrine of the *Sears* and *Compco* decision. *Gordon v. Warner Bros. Pictures, Inc.*, 74 Cal. Rptr. 499, 504 (1969).

Another obstacle to presentation of the federal preemption question is that, unlike the patent and copyright statutes, the federal statute applicable to trade names requires a finding that the name was "used in commerce" within the meaning of 15 U.S.C. § 1127.

It cannot be presumed that the jury found that the name "La Nouvelle Eve" was used in interstate commerce. The instructions directed to the damage issues under the civil conspiracy claim did not condition the award on such a finding.

As to the fourth damage issue, there can be no federal preemptive effect on the law of protection of the right to the services of the plaintiff's performers.

In sum, the record does not justify the presentation of a constitutional question arising from the preemptive effect of the *Sears* and *Compco* decisions. The verdict can be supported by evidence whose elements are of such character that *Sears* and *Compco* expressly do not preclude recovery upon such a showing.

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MORTON R. GALANE,
Counsel for Respondent.